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IN THE

Supreme Court of the United States

No. 414.

October Term, 1951.

SAMUEL MANDEL, Administrator of the Estate of
ROBERT WILLIE DILLEHAY, Jr., Deceased,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ABRAHAM E. FREEDMAN,
Counsel for Petitioner.

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UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, Samuel Mandel, Administrator of the Estate of Robert Willie Dillehay, Jr., deceased, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled matter.

THE OPINIONS OF THE COURTS BELOW.

Two opinions were filed by the District Court for the Eastern District of Pennsylvania; one by Judge McGranery on November 21, 1947, reported in 74 F. Supp. 754 (R. 23a), and the other by Judge Kirkpatrick on August 14, 1950, reported in 93 F. Supp. 692 (R. 61a). The opinion of the United States Court of Appeals for the Third Circuit was filed on August 16, 1951 and is reported in 191 F. 2d 164.

JURISDICTION.

This proceeding was brought under the provisions of the Public Vessels Act (46 U. S. C. 781), and the Suits in Admiralty Act (46 U. S. C. 741), claiming damages for wrongful death.

The judgment of the Court of Appeals sought to be reviewed was rendered on August 16, 1951. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

Are civilian seamen, who are injured in the course of employment on government vessels, entitled to bring an action under the Public Vessels Act or the Suits in Admiralty Act to recover the benefits afforded by the maritime law, or are they limited to the remedy under the Federal Employees' Compensation Act?

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action for wrongful death under the Suits in Admiralty Act on behalf of the widow of a deceased merchant seaman.

The decedent, Robert W. Dillehay, was a member of the crew of the tugboat "L. T. 221", a government owned vessel which was manned by a civilian captain and crew from the Army Transport Service. He met his death on October 15, 1944, when the vessel was negligently navigated into a mine field outside the harbor of Cagliari, Sardinia, resulting in the destruction of the vessel with heavy loss of life.

The government moved preliminarily to dismiss this libel upon the ground that the widow had no right of action under the Suits in Admiralty Act or the Public Vessels Act, and contended that her sole remedy was under the Federal Employees' Compensation Act (5 U. S. C. 751 et seq.). That

motion was denied in an opinion by Judge McGranery holding that the widow had an election to claim damages under the former Acts or to accept compensation under the latter.

Prior to the trial, the government was ordered by the District Court to produce certain statements of witnesses regarding the disaster but the government filed a claim of privilege and refused to comply with the order. Chief Judge Kirkpatrick overruled the claim of privilege and directed that judgment be entered against the government and that the case proceed to trial on the question of damages. From that judgment, the government appealed to the Court of Appeals for the Third Circuit, assigning as error the decision overruling the claim of privilege, and the earlier decision of Judge McGranery denying the government's contention that the Federal Employees' Compensation Act provided an exclusive remedy for civilian seamen.

The Court of Appeals did not reach the question of privilege but reversed the judgment on the jurisdictional ground that there was no right of action under the Suits in Admiralty Act and the Public Vessels Act, and holding further that the widow's sole remedy was under the Compensation Act.

SPECIFICATIONS OF ERROR TO BE URGED.

The learned Court of Appeals for the Third Circuit erred in the following respects:

(1) In holding that the Court had no jurisdiction to entertain any suit for personal injury to or death of a civilian seaman in government employ, under the Suits in Admiralty Act or the Public Vessels Act;

(2) In holding that the sole and exclusive remedy for personal injury to or death of a civilian seaman in government employ is under the Federal Employees' Compensation Act;

(3) In departing from the established construction of the statutes involved and in relying upon irrelevant considerations and mistaken impressions as that: the compensation provides a more humane and fairer remedy than damage actions; the elimination of the damage action will remove an element of unfairness and discrimination against military personnel; that judicial review of the negligence of military personnel is an incongruous subject for litigation and undesirable from the standpoint of national defense.

REASONS FOR GRANTING THE WRIT.

(1) The Decision of the Court Below Creates a Direct Conflict With the Decisions of the Fourth and Ninth Circuits.

The Court below held that a civilian seaman, injured on a government vessel is limited to the remedy under the Compensation Act, and he is not entitled to the benefits under the Suits in Admiralty Act or the Public Vessels Act. The Fourth and Ninth Circuits have held exactly to the contrary.

In the case of *United States v. Marine*, 255 F. 2d 456 (C. A. 4), a United States Customs Inspector was injured in the discharge of his official duties while leaving a merchant vessel owned and operated by the United States. The Court of Appeals for the Fourth Circuit denied the contention that he was limited to the remedy under the Compensation Act and held that he had an election to accept the benefits under that Act or to bring an action for damages under the Suits in Admiralty Act. The same Court of Appeals in the case of *Johnson v. United States*, 186 F. 2d 120, most recently followed the same rule. There a civilian seaman engaged as a deckhand aboard a United States patrol boat, a public vessel, was injured while on duty, due to the negligence of a superior officer. The Court applied the rule

that the civilian seaman had an election to sue for damages under the Public Vessels Act or to accept compensation.

The Ninth Circuit Court of Appeals followed the same rule in *United States v. Loyola,* 161 F. 2d 126, where a civilian seaman became ill while serving on an army transport. He was held entitled to the benefits of the Public Vessels Act. In the case at bar, the Court below expressly refused to follow the rule adopted in the Fourth and Ninth Circuits, and held, in direct conflict with the decisions from those Circuits, that the civilian seaman's remedy is exclusively under the Federal Employees' Compensation Act, with no right to bring an action under the Suits in Admiralty Act or the Public Vessels Act.

Immediately prior to the time the decision below was rendered, the Court of Appeals for the Second Circuit adopted the same rule in *Johansen v. United States,* 191 F. 2d 162, holding in a split two-to-one decision that a civil service employee on an army transport could not bring any action under the Public Vessels Act, but was limited to the remedy under the compensation law.

The decisions of the Second and Third Circuits are thus in direct conflict with those of the Fourth and Ninth Circuits on a basic question involving the interpretation of three federal statutes. In order to insure the uniform operation of the federal legislation and to resolve the conflict among the several circuits, it is essential that this court exercise its right of review.

(2) The Holding of the Court Below That the Federal Employees' Compensation Act Provides an Exclusive Remedy Conflicts With the Decisions of the United States Supreme Court.

The Court of Appeals below made the specific finding that the Federal Employees' Compensation Act provided an exclusive and not an elective remedy. This Court has ruled to the contrary. In *Dahn v. Davis,* 258 U. S. 421, a railway

mail clerk in the employ of the United States was injured on a railroad operated by the Director General of Railroads. Suit for damages was brought against the Director General under the Federal Control Act (40 Stat. at L. 451 Chap. 25), who defended upon the ground that the Compensation Act provided the exclusive remedy. The Supreme Court denied the government's contention and ruled that the Compensation Act afforded an elective and not an exclusive remedy. The Court held that those employees who are injured by the fault of the government now have a choice of remedies: they can elect to accept compensation or they can sue for damages.

In *Brooks v. United States,* 337 U. S. 49, two army servicemen, while on leave, were struck by an army truck driven by a civilian employee of the Army. The Supreme Court held that the injured army men had the right to bring an action under the Tort Claims Act (28 USCA 1948 ed. 2671), and this right is in addition to all other rights enacted for the benefit of servicemen. In making an analysis of all relevant legislation, the Court again took occasion to point out that the remedy under the Federal Employees' Compensation Act is elective and not exclusive as the government here contends.

In *Brady v. Roosevelt Steamship Co.,* 317 U. S. 575, the suit was by a United States customs inspector for an injury sustained on a government owned vessel. The Court held that the customs inspector, a civilian employee, had the right to sue the United States under the Suits in Admiralty Act.

The conclusion reached by the Court below that the Federal Employees' Compensation Act provides an exclusive remedy, is thus not only in conflict with the decisions from the other Circuits, but it is also in direct opposition to the rulings of the United States Supreme Court.

(3) The Court Below Failed to Give Adequate Consideration to the Ordinary Meaning of the Statutes and to Their Legislative History.

The Court below did not render any analysis of the Statutes involved or of their legislative history, in making its interpretation, but relied upon what it deemed to be considerations of fairness and national security. Had the Court rested its decision upon the plain language of the Statutes and the expressed Congressional purpose, a different conclusion would have been reached.

The first authoritative expression was rendered by the Supreme Court in *Brady v. Roosevelt S. S. Co., supra,* where an examination of the Suits in Admiralty Act was made and the Court expressly stated that a right of action was given under that Act to a government employee injured on a government vessel. A comprehensive analysis of the legislation is set forth in the opinion of Chief Judge Groner in *United States v. Marine, supra.* Judge Groner first adverted to the Supreme Court decision in the *Brady* case and then proceeded to make his own analysis of the Suits in Admiralty Act, as follows:

> ". . . we have no manner of doubt from the plain words of the Statute, considered in the light of the ordinary rules of statutory construction, that we are required to reach the same result. In substance, the provision in question is that whenever a proceeding in admiralty could be maintained against a privately owned and operated vessel, a libel in personam may be brought against the United States in the operation of its merchant fleet. We are not at liberty to alter or add to the plain language of the statute to effect a purpose which does not appear on its face. There is certainly no suggestion in this language, or in any other language of the Suits in Admiralty Act, *which implies that the right is limited to persons outside the provisions of the Employees' Compensation Act, and it is a fair inference that if Congress had intended that result*

it would have said so in unmistakable terms. The fact, of course, is that the inference is directly the other way.'' (Emphasis supplied.)

The history of the legislation compels the same conclusion. Prior to the enactment of the Suits in Admiralty Act, government vessels in the merchant service were subject to attachment as well as privately operated vessels, much to the embarrassment of the government. Section 1 of the Act was designed to abolish the right to arrest government vessels, and, to compensate for the loss of that right, Section 2 of the Act substituted a right in personam against the government. The government was thus not creating a right of action for the first time, but rather it was substituting one form of remedy for another. In this situation the waiver of sovereign immunity must be regarded in a different light than ordinarily. Under Section 2 of the Suits in Admiralty Act countless suits for damages by civilian seamen have been brought against the government which would previously have been instituted against the vessels in rem. So clear is the seaman's right to sue the government under the Suits in Admiralty Act, that the innumerable actions brought under the Act were recognized by the government itself as being validly brought, and were not challenged until very recently. A small fraction of the cases brought against the government is set out in *Gibbs v. United States*, 1951 A. M. C. 119. From the very beginning the legislation was construed to preserve to civilian seamen on government vessels their rights under the maritime law, and all attempts to apply the Federal Employees' Compensation Act as an exclusive remedy have heretofore been consistently defeated.

Having failed in its efforts to bring federally employed seamen within the scope of the Compensation Act by judicial decision, the government sought to accomplish the same result by an amendment to the Compensation Act in 1949. Section 201 of the proposed amendment was designed to make the Act the exclusive remedy for all civilian employees of

the government. As originally framed, this section would have included civilian seamen and it would have nullified all of their existing rights under the maritime law. The seamen Unions and their representatives were not made aware of the proposed bill and they were not invited to the legislative hearings on the bill. The bill passed the House but it was blocked in the Senate when the seamen Unions appeared and entered a protest. The Senate Committee, after further consideration, then adopted an amendment modifying Section 201 which made the Compensation Act the exclusive remedy, by adding the clause: "Provided, however, that *this subsection shall not apply to a master or member of the crew of any vessel*". Moreover, to make certain that the seamen's maritime rights would be preserved, without exception, the Committee amended Section 305 by adding subsection (b) which provides: *"Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel"*.

The report which was submitted with the amendments, clearly recognizes that civilian seamen in government service possessed the right to bring an action under the Suits in Admiralty Act or the Public Vessels Act and it was just as clearly intended to preserve that right. In this connection the report shows (p. 13608 Cong. Rec.—Senate, September 30, 1949):

> *"Subsection (b) of the proposed new section 305 is intended out of caution, to reaffirm what is accomlished by the proposed amendment to section 201 of the bill, lest some other provision of the bill, which in some some way not now foreseen, might be construed to take away any election of remedies that seamen might now have.* The new subsection would make clear that no provision of this amending act, as distinguished from the existing Compensation Act itself, shall be construed to affect any maritime rights or remedies of seamen. The purpose is to reserve to seamen what-

ever rights they now have, or may be held to have, under maritime law, and to allay the fears that have been expressed that the amendments to the Compensation Act being made by this bill will be construed to negate or reduce any of the maritime rights and remedies of seamen."

By this amendment, the Congress expressly recognized that the seamen had an election between the benefits under the Maritime law and those under the Compensation Act. The amendment maintains the status quo by specifically withdrawing the seaman from the exclusivity clause and by expressly reserving all maritime rights to the seamen.

It is pertinent to add that the very inclusion of the exclusivity clause into the body of the Act for general application significantly emphasizes the contention that the Compensation Act was previously not regarded as an exclusive remedy generally, and the amendment was intended to change the picture and make the Act the sole remedy wherever it was applicable. The fact that the seamen were excluded from the exclusivity clause is proof positive that the seamen were never before limited to the Compensation Act and it was not intended that they should be by the amendment.

The whole history of the legislation discloses that Congress intended to maintain the seamen in statu quo in the enjoyment of their maritime rights. They had a remedy prior to the enactment of the Suits in Admiralty Act and the Public Vessels Act, for the enforcement of those rights by an action in rem against the vessel. The same Act, which abolished that remedy, created a new personam remedy in favor of civilian seamen in government employ for the enforcement of all maritime rights against the United States. The language of the Act plainly conveys this interpretation. The Courts so construed it, and, from the date the Suits in Admiralty Act was enacted until recent years, many thousands of cases have been brought and judicially determined upon that basis. The government attempted first, in recent

years, to wipe out the civilian seamen's maritime rights against the government through the courts, and, failing in which, the government attempted to accomplish the same result by means of legislation in the form of the amendment above referred to. Since that effort likewise proved unsuccessful, the government is now back in the Courts asking the Judiciary to do what the Congress has refused to do.

The Court below departed from the established rule without giving adequate consideration to the plain meaning of the legislation involved, and to the Congressional intent, and erroneously relied upon irrelevant and mistaken impressions. It is essential that this court exercise its supervisory powers to correct the erroneous construction which the Court below has placed upon important Federal legislation.

(4) The Court Below Relied Upon Irrelevant Considerations and Mistaken Impressions in Departing From the Established Rule of Construction.

The first of the reasons assigned in support of the conclusion of the Court below is that the Compensation Acts generally are more "humane, fair and adequate and a more enlightened form of remedy". If it were to be assumed arguendo that such is actually the fact, it is apropo to state that it is not the prerogative of the Courts to ignore the existing law and read into the statutes a meaning never intended by Congress. Such changes in the law are exclusively the function of the legislative branch, and the action of the Court below clearly trespasses upon the Congressional domain.

Moreover, the Court below is completely in error in its characterization of the Compensation Acts. Experience has proven that the remedy is neither enlightened nor adequate or fair. The Compensation Acts have not eliminated the necessity for litigation as is generally assumed but, on the contrary, they have resulted in more and protracted liti-

gations than is involved in other remedies. Mr. Justice Murphy in *Cardillo v. Liberty Mutual Ins. Co.*, 330 U. S. 469, characterized the remedy as "deceptively simple and litigiously prolific". Many claims are daily denied because of inherent weakness in the system of workmen's compensation which invites all sorts of defenses. Some of these defenses and weaknesses are analyzed in an able and comprehensive article by Samuel B. Horovitz, Esquire (3 NACCA Law Journal 15), leading authority on workman's compensation law.

Nor does the litigation cease even after a claim is allowed. For the employer periodically files petitions to terminate or cut down the award, thereby requiring the claimants to obtain the services of counsel and physicians in opposition to those of the employer. Because of the employee's financial inability to frequently procure such professional services, his claim often falls by the wayside or is sharply reduced.

As a direct consequence of the Compensation Acts, the standard of living of injured employees and their families has been reduced to incredibly low levels and they frequently become the burdens of the community.

It was because of such considerations that the English law was recently changed in order to improve the plight of the injured employee. The "Law Reform (personal injuries) Act", 1948 (11912 Geo. 6, C. 41), amends the law and gives to the injured employee the right to recover damages *in addition* to the right to recover one-half of the benefit under the Compensation Laws. This form of remedy is much closer to being an enlightened one and more nearly approaches the remedies under the Maritime Law such as maintenance and cure and damages. For example, the obligation to provide maintenance and cure covers illnesses as well as injuries, and it need not arise out of the employment so long as the illness or injury is manifested during the employment. The Compensation Laws do not provide relief for illnesses and require further that the injuries be

caused by the employment. The right to maintenance and cure alone by far exceeds the remedy under the Compensation Acts. It is broader in scope and more liberal in amount.

These features are simply some of many differences between the two systems of law demonstrating that the Compensation Laws do not nearly begin to approach the other system as a realistic and enlightened form of remedy.

It is worthwhile bringing to this Court's attention the fact that the Federal Employees' Compensation Act, in addition to possessing the weaknesses already adverted to, is unique in that it virtually provides an ex parte determination of the right to compensation. The cases are decided upon information obtained by an investigator, there is no testimony taken, the information is not obtained under oath and there is no semblance of a hearing. The claimant is not heard, nor is he permitted to know what information is in the file, or the "evidence" which forms the basis of the decision. He is precluded from examining his own medical records at the Marine Hospitals or U. S. Public Health Service in claims under the Federal Employees' Compensation Act. It is into this orbit that the government seeks to draw the civilian seamen and deprive them of the truly enlightened rights and remedies under the maritime law.

The second reason advanced by the Court below in support of its decision is that the inclusion of civilian seamen into the Compensation Act removes an element of unfairness and prevents discrimination against the military personnel in the armed forces. The rationale is that military personnel cannot sue the government for damages on account of injuries sustained in the course of duty and, therefore, it would be discriminating against these men if the civilian seamen were permitted to recover damages for injuries sustained in the course of their employment. It is respectfully submitted that this type of reasoning also is

a proper consideration for the legislative body and not for the Judiciary. The Courts may not ignore the clear intent of a Statute because of what they deem to be considerations of fairness.

In passing, it must further be noted that there is no such unfairness or discrimination as was assumed by the Court below. The Congress, in its wisdom, has enacted from time to time a series of remedies for military personnel, which only they may take advantage of, such as pensions, disability benefits, insurance provisions, educational and vocational training benefits, extraordinary medical benefits, preferences in civil service jobs, unemployment allowance and many others. Congress did not extend those benefits to civilians but enacted entirely different remedies consistent with the existing law applicable in private industry. Congress made it very clear in the Suits in Admiralty Act and the Public Vessels Act that civilian seamen engaged on government vessels shall be regarded exactly the same as seamen in private employment and governed by the same laws. It is wholly unrealistic under the circumstances to say that an undue advantage is given to civilian seamen or that any discrimination is practiced against military personnel. Congress provided for each group in a manner that it considered appropriate and it is not the prerogative of the judiciary to change or defeat the legislation.

Finally, the Court below reasoned that it is not in the public interest to have judicial review of the question of negligence of military personnel; that it is an incongruous subject for litigation and undesirable from the standpoint of national defense. Here again the Court below was stepping out of its field and invaded the legislative. It must be noted first that the vessel was manned and commanded by civilian seamen, and the negligence involved relates to the conduct of a civilian captain. The Court was not asked to evaluate the conduct of a military commander. But in any event, even if a cause of action should be predicated

upon the alleged negligence of military personnel, it is difficult to see why it would be incongruous or inimical to the national security for a court to test the facts in accordance with our democratic procedures. The government engaged the crew as civilian seamen and the Congress had provided that under these circumstances the government must be regarded as any other employer in private industry and subject to the same obligations. In *Brooks v. United States, supra,* an army serviceman was injured while off duty by an army truck and brought suit for damages under the Tort Claims Act. The government challenged the serviceman's right to bring an action under the Tort Claims law and "envisaged dire consequences" if a battle commander's judgment should be questioned. The Court rejected the "fear" argument and pointed out that there was no question of a battle commander's judgment at issue, and that question would be decided when and if such an issue is presented. The Court sustained the serviceman's right to sue the government for the negligence in operating an army truck.

All of the reasons which impelled the Court below to hold that the Compensation Act is the exclusive remedy for civilian seamen in government employ, fail to withstand analysis both because they are based upon erroneous assumptions and premises, and because that kind of reasoning is appropriate for the legislative and not the judicial branch of the government. All these considerations were presented to the Congress in connection with existing legislation and carefully considered.

Congress made it perfectly clear in the Suits in Admiralty Act and the Public Vessels Act, that the liability of the United States in connection with civilian seamen employed on government vessels is precisely the same as though the United States were a private operator. Congress did not impair any of the seamen's maritime rights by the enactment of the Compensation Act, but on the contrary, expressly reserved those rights and afforded an elec-

tion, giving the seamen a choice of remedies. The decision of the Court below directly violates the clearly expressed intent of the legislation and it is in direct conflict with the applicable decisions of this Court and of the Fourth and Ninth Circuits.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should exercise its right of review to resolve the conflict caused by the decision below and grant this petition for a writ of certiorari.

Respectfully submitted,

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